IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12602 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE KSHITIJ R.VYAS

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KAPILABEN AMBALAL PATEL HEIRS OF DECD. AMBALAL P. PATEL & 18 - Petitioner(s)

Versus

STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR P M Thakkar, Sr.Counsel with PM BHATT for Petitioner(s) : 1 - 19.
Mr S N Shelat, A.G. With Mr K L Pandya, Asstt.GOVERNMENT PLEADER for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE KSHITIJ R.VYAS

Date : 21.12.2005

CAV JUDGMENT

The petitioners, in this petition under Article 226 and 227 of the Constitution of India have prayed to declare panchnama dated 20.3.1986

Annexure 'D' and the purported action of the respondents to take possession – constructive or actual, of the lands mentioned in para (1) of the petition which is contrary to law and of no legal effect and permanently restrain the respondents from disturbing or taking possession of the petitioners lands admeasuring 12,385 sq.meters or any part thereof mentioned in the panchnama – Annexure 'D' and commanding the respondents to deliver back to them possession of the said lands, if they are held to be in possession de facto and de jure thereof and to restrain the respondents from taking any proceedings in respect of the said lands pursuant to the order dated 1.2.1985 of the competent authority.

2. The facts of the case in brief are as under:

Petitioners are the heirs and legal representatives of late Ambalal Purshottamdas Patel, who expired on 30.12.1985. On commencement of the Urban Land (Ceiling and Regulation) Act, 1976 (for short, 'the ULC Act'). Ambalal Purshottamdas jointly with Bhikhabhai Maganbhai, Ramanbhai Purshottamdas, Jayantibhai Babarbhai and Smt. Jadavben Bhailal held agricultural lands of village Manjalpur, the details of which are given below:

Survey no.	Areas in sq.mtrs.
362	10,825
378	4,249
592	10,927

593/1	10,218
593/2	101
594	4,692
Total	41,012

They have also held land bearing survey no.332 of village Tarsalia admeasuring 3136 sq.meters. They filed a statement in form No.VI under section 6 of the ULC Act. The lands were exempted under the ULC Act as agricultural lands under orders dated 6.3.1980 of the Dy.Collector, Vadodara and dated 29.11.1980 of the Dy.Secretary, Revenue Department, Government of Gujarat. The competent authority, vide its order dated 17.6.1981 fixed hearing of the statement in form No.VI on 1.7.1981. Pursuant to that, the land holders have filed their objections stating inter alia that they were filing application for the approval of a scheme under section 21 of the ULC Act. On 7.11.1983, the State Government withdrew the said agricultural exemption. The said land was covered under the Town Planning Scheme No.`19 (Manjalpur) which became final and came into operation dated 17.10.1988. However, the process of making of the T.P. Scheme was in progress when the competent authority passed order dated 1.2.1985, under section 8(4) of the ULC Act held that the holders were entitled to retain 18662.7 sq. meters of land and that land admeasuring 12385.3 sq.meters shown below were excess vacant land held by them:

survey no.	Final plot no.	Area in sq. metrs.
362	280 part	2672
378	287	3035
592	108	2747
593/1	115	1546
593/2	116	2385

It is averred by the petitioners that on this date T.P scheme no.10 had not become final and the final plot numbers mentioned in the order are the plots to be reconstituted under the T.P scheme partly from the original survey numbers held by the said holders and partly out of survey nos belonging to others prior to the coming into force of the TP scheme. Of the 12,385 sq.meters declared as excess vacant lands, only 4486 sq. meters were part of the holding of the joint holders and the remaining 7899 sq.meters belonging to the persons other than the joint holders. On 21.3.1985, notification under section 10(1) of the ULC Act was issued and on 25.7.1985, notification under section 10(3) of the ULC act was issued in terms of the competent authorities, orders dated 1.2.1985 and were published in the Government Gazette.

3. On 22.8.1985, Ambalal Purshottamdas and Tribhuvan Chhotalal have constituted an attorneys of 23 land holders including Ambalal and the petitioner submitted an application for exemption of the lands under section 21 of the ULC act for claiming exemption which was within the

time prescribed under rule 11 of the Urban Land (Ceiling & Regulation)Rules, 1976. Pending disposal of the application dated 22.8.1985, Ambalal Purshottamdas Patel expired on 30.12.1985. On 23.1.1986, the competent authority issued notice to Ambalal since deceased, other holders Bhikhabhai Maganbhai, Natverbhai Bhailalbhai, Jayantibhai Babarbhai demanding possession of the excess vacant land. It appears that the notice could not be served on Ambalal and was returned back to the competent authority nor it was served on the other holders. On 20.3.1986, panchnama of taking over possession of the excess vacant land as prescribed in the statement annexed to the competent authority's order dated 1.2.1985 was drawn. On 15.12.1986 the competent authority ordered that the application for exemption under section 21 of the ULC Act be filed.

4. Ramanbhai P Patel and Tribhuvan Chhotabhai Patel has constituted attorneys of all land holders filed an appeal being Appeal No.Vadodara/2 of 1987 before the Urban Lands Tribunal and Secretary, Revenue Department, Ahmedabad (for short, 'the tribunal') against the order dated 15.12.1986 of the competent authority. The tribunal, by its judgment and order dated 28.8.1995 dismissed the said appeal. On 29.4.1998 Devikaben Bhailalbhai Patel, Kirtikaben, Manishaben and Hitesh Chandulal Patel made application to the tribunal for review of its

order dated 28.8.1998. On 9.4.1999 Karansinh Atalia, Advocate constituted attorney for Ambalal Purshottamdas Patel and others made an application to the competent authority for cancellation of the Notifications subsequent to the Notifications under section 10(1) of the ULC Act. On 19.9.1998, the tribunal allowed the review application of the petitioners by setting aside the order dated 15.12.1986 of the competent authority and remanded the matter to the competent authority for fresh decision after affording opportunity of being heard. It is an undisputed fact that no fresh decision has been taken by the competent authority on the petitioners' application dated 22.8.1985 under section 21 of the ULC Act.

5. On 11.1.1999, the ULC Repeal Ordinance repealed the Ceiling Act in the first instance in the whole of the States of Haryana and Punjab and all the Union Territories and provided that the ordinance would apply to such other States which adopted the Ordinance by Resolution passed in that behalf under Article 252 (2) of the Constitution of India to adopt in the State of Gujarat the Repeal Act.

5.1. On 22.10.1999, Kamleshbhai Parekh, has constituted attorney of Ambalal Purshottamdas Patel filed a petition being Special Civil Application No. 8402 of 1999 for declaration that the action of the State in taking possession of the land to the tune of 12385 sq. meters is contrary to law. This court (Coram: D C Srivastava, J (as he then was) partly allowed

the petition on the following terms:

> "i. The writ petition is partly allowed with no order as to costs.
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> ii. It is declared that the action of the authorities under the ULC Act upto the state of section 10(3) of the Principal Act are in accordance with law which cannot be disturbed in this writ petition. However, the action at the stage of section 10(5) of the Act is illegal and consequently taking over possession either physical or actual or symbolic or on paper of the excess land has become illegal.
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> iii. The possession of an area of 12385 sq.metrs of land of final plot nos. 115, 116, 108, 287 and 280 of Mangalpur (sic) District Vadodara is ordered to be restored by the respondents to the petitioners within the period of two weeks from today."

6. On 27.8.2001, the respondents filed Letters Patent Appeal No.460/02 against the judgment and order along with application being C.A. No. 9662 of 2001 for condonation of delay of 238 days caused in filing the LPA. It is the case of the petitioner that after the notice was issued in the Civil Application, the respondents came to know of the death of Ambalal Purshottamdas Patel and on consequent termination of Ambalal's power of attorney in favour of Kamlesh Parekh, the respondent appeared to have taken a stand that in view thereof the Special Civil Application no.8402 of 1999 was not competent and the judgment and order dated

15.12.2000 of Justice D C Srivastava (as he then was) liable to be set aside. The petitioners filed the present petition claiming the same relief as prayed in the earlier petition.

7. During the course of hearing, the respondents in fact produced the order passed by the Division Bench in LPA dated 16.8.2005 allowing the LPA on the ground stated above. Upon the death of Ambalal Purshottamdas Patel, the power of attorney holder did not have the authority to institute the Special Civil Application and, therefore, the Special Civil Application itself was not maintainable. Accordingly, the order of the learned Single Judge shall stand dismissed. The Division Bench however, made it clear that this order was not in any manner influence or affect the adjudication of Special Civil Application No.12602/01 filed by the legal heirs of late Ambalal Purshottamdas Patel i.e. the present petition.

8. I have heard Mr P M Thakkar, learned Sr.Counsel appearing with Mr P M Bhatt, learned Advocate for the petitioners and Mr S N Shelat, learned Advocate General appearing with Mr K L Pandya, learned AGP for the respondent State at length. I have also gone through the averments made in the petition and the various authorities cited by the learned counsels. Mr Thakkar for the petitioners submitted that in view of section 4 of the Repeal Act read with the Resolutions passed by the

Gujarat Legislative Assembly adopting the ULC Repeal Act, 1999 (Act No.15 of 1999), it is not competent to the respondents to take any further steps in respect of the lands declared as excess vacant land under the order dated 1.2.1985 of the competent authority. He further submitted that so long as scheme application no.21 is not disposed of, the State has no right to proceed beyond section 10(3) of the ULC Act. It is submitted by Mr Thakkar that on the decision of the review application i.e on 19.9.1998 by the tribunal setting aside the order dated 15.12.1986 of the competent authority remanding the matter to the competent authority has not been proceeded further nor any order is passed thereafter, the proceedings under section 21 of the ULC Act became alive and since no objection challenging the order passed in the review application was preferred by the respondents and on the contrary, immediately thereafter the petitioner filed the petition being Special Civil Application No. 8420/99 and the same was allowed on 5.2.2000 and there is no delay on the part of the petitioners. Under the circumstances, it was submitted that unless scheme application under section 21 is decided, no proceedings beyond section 10(3) of the ULC Act can be initiated and, therefore, the petitioners are entitled to the relief as prayed for in the petition; especially when the interim relief is operative till the date. Mr Thakkar has cited following authorities to substantiate his submissions:

(i) Samrathben M Chokshi v. State of Gujarat (1994) 1 GLR 203

(ii) Smt. Darothi Clare Parreira v. State of Maharashtra – AIR 1996 SC 2553

(iii) Savitaben Ramanlal Patel v. State of Gujarat - (1999) 1 GLH 100

(iv) Special Officer and Competent Authority, Urban Land Ceilings, Hyderabad v. P S Rao – JT 2000 (1) SC 393

(v) LPA No.5 of 2002 decided on 25.6.2003 by the Division Bench (Coram K R Vyas & M S Shah, JJ.)

9. Mr S N Shelat, learned Advocate General appearing for the respondent, on the other hand, submitted that the relief claimed in the petition are in the nature of a suit for possession and for permanent injunction. It is submitted by him that it is a civil action for which remedy under the Civil Suit is available to the petitioners and, therefore, this court may not entertain this petition which is in the nature of suit, under Articles 226 and 227 of the Constitution of India, especially when there are disputed questions of facts about the question of possession which can be decided by the Civil Court. He, further submitted that the reliefs claimed are barred by delay, latches and acquiescence. To elaborate his submissions, it was submitted that the possession of the land in question has been taken on 20.3.1986 for which panchnama was executed in the presence of panchas before the competent authority and the Dy.Collector. The present petition is instituted on 27.12.2001. Thus there is gross delay

of 15 years. Article 113 of the Limitation Act provides period of limitation of three years. While exercising jurisdiction under Article 226 of the Constitution of India normally the court does not interfere in the matter which is already barred under the Limitation Act. Even the suit for recovery of possession would be barred by the limitation period being 12 years. It was further submitted by the learned Advocate General that the petitioners never challenged the panchnama and the possession taken till the date of filing of the present petition i.e. 27.12.2001. In any proceedings taken out subsequently also there has been no challenge to taking over of the possession even at the stage of application under section 21. The petitioners, therefore, have acquiesced in the proceedings and are seeking to take benefit of the Repeal of the Urban Lands Ceiling Act. It was submitted that the Repeal Act only protects the right acquired under the Act and does not create any right in favour of the petitioners. Mr Shelat submitted that Special Civil Application No.8402 of 1999 was filed on 22.10.1999 by deceased Ambalal through the power of attorney holder of the said deceased. Even the said petition was delayed as it was notified on 22.10.1999 and the court could not have exercised jurisdiction under Article 226 of the Constitution. In the LPA preferred against the judgment passed in Special C.A. No. 8420/99 dated 5.12.2000, it was set at naught declaring that the proceedings could not have been initiated by

dead person and, therefore, the appellate court did not examine the merits of the matter. The decision having been declared null and void, the said judgment cannot be cited before this court.

9.1. On the relief claimed by the petitioners that the respondents be restrained from implementing the order dated 1.2.1985 declaring the lands surplus, it was submitted that the petitioners have never challenged the order declaring the surplus land dated 1.2.1985 till the filing of the present petition. The prayer is grossly barred by delay, latches and acquiescence. It was submitted that it is an after-thought after the Repeal of the Act. To substantiate his submissions, the learned Advocate General has cited the following authorities:

(i) State Bank of India v. Pralaysaran Chakrabarty – AIR 1999 SC 2281.

(ii) The Municipal Council, Ahmednagar v. Shah Hyder Beig & Ors. - JT 1999 (10) SC 336

(iii) State of Maharashtra v. Digambar – JT 1995 (9) SC 310

(iv) State of Orissa vs. Lochan Nayak (dead) by LRS. - 2003 (supple.) (1) JT 622

On the contentions that the proceedings dated 11.4.1986 are null and void and is erroneous in law, it was submitted by the learned A.G, that even if it were void or invalid in law, the petitioners are required to take proceedings to set aside the said invalid order within the time prescribed

by law as invalid orders cannot be ignored. Challenging the submissions of the petitioner that the factum of possession under the panchnama is required to be ignored, it was submitted by him that in view of the settled law, the said order for taking over possession after vesting of the lands in Government was required to be challenged by the petitioners within reasonable time. To support his submission, reliance was placed on the following decisions:

(i) State of Punjab v. Gurudev Singh – AIR 1992 SC 111

(ii) Velamuri Venkata Sivaprasad (D) by Lrs. v. Kothuri Venkateswarlu (D) by Lrs. - 1999 (9) JT 242

(iii) Sultan Sidik v. Sanjay Roy Subbha - 2004 (1) JT 23

(iv) Jadav Prabhatbhai v. Parmar Karsanbhai -2001 (1) GLR 16 (FB)

On the submission that the order of tribunal dated 19.9.1998 in review application remanding the matter back, application under section 21 having been revived, after having invited my attention to the following chronological events, it was submitted that the appeal having been dismissed on 28.8.1995, possession taken cannot be said to be unauthorised. He submitted that possession was taken as required under the law and it was never been sought to be quashed. It was, therefore, submitted that the possession of the State Government was lawful and under the Act:

8.3.1985	10(6) Notification published on 21.3.1985 for acquisition
31.5.1985	Notification under section 10(3) for vesting published on 25.7.1985
17.12.1985	Notice under section 9(1) and 10(5) issued
20.3.1986	Possession taken in presence of the panchas. Panchnama executed before the competent authority
11.4.1986	Intimation to the Mamlatdar and the petitioner about taking over possession. Notice under section 10(5)
6.8.1986	Compensation determined under sec.11 The above events show that the petitioners during the proceedings under section 10(3), 10(4) and 10(5) and 11 have never objected on the ground that his application under section 21 for exemption was pending.
5.1./22.12. 1985	Deceased Ambalal Patel filed application for exemption under section 20
15.12.1986	Application was rejected
28.8.1995	Appeal was dismissed
6.8.1986	Compensation determined under section 11.

9.2. Without prejudice to the above contentions, it was submitted that the application for review was filed by Devikaben and other petitioners No.15,16,17 and 18. The present petitioner Nos. 1 to 14 and 19 had never filed application for review against the order dated 28.8.1995. Under the circumstances, possession that was taken on 20.3.1986 was final qua the

petitioners no.1 to 14 and 19 even if the order for review were to be considered. Learned A.G submitted that the order passed by the competent authority dated 1.12.1985 has declared the following lands belonging to the branch of Chandubhai Bhailalbhai as surplus. Petitioners No.15 to 19 who filed review petition are claiming through the branch of Chandulal Bhailalbhai. He invited my attention to page No.278 which shows the following statement:

sr.no.	Holder's name	Holding	Permissible holding	Excess land
	Chandubhai Bhailalbhai	1546.04	1500	46.04

(i) The Review petition was barred by limitation – period of limitation being 30 days.
(ii) The order under review is without jurisdiction. The limitation period is not noticed.
(iii) Under O.47 R.1 under which the review application can be instituted provides that any person considering himself aggrieved may apply for review of the judgment to the court which passed the decree or made order.

According to the learned A.G., petitioners No.15 to 18 only claimed relief for review. No other person interested has filed a review petition. The benefit of the order for review cannot be claimed by the other petitioners. The decision as regards surplus land is final because exemption application has been rejected in appeal. The finality of the order cannot be disturbed at the instance of the petitioner Nos. 15 to 18. Finally the

learned A.G submitted that even the authority has also said that the review is allowed to the limited extent and, therefore, under Article 226 of the Constitution of India, this Court may not grant any relief in favour of the present petitioner against whom the order for rejection of the application under section 21 is final and the compensation is already determined. He has submitted that the provisions of the Act do not contemplate that the possession validly taken would become invalid during the pendency of section 21 of the application.

10. Having considered the submissions advanced on behalf of the parties, at the outset, it may be stated that the petitioner claimed the very relief prayed in the present petition in the first petition viz; Special Civil Application no. 8420 of 1999 and this court allowed the same by granting the reliefs prayed for. It is true that the judgment and order passed in the said petition was set aside in LPA by the Division Bench of this Court. However, the LPA was allowed on the ground that the petition was filed in the name of the dead person. The Division Bench chosen not to enter into the merits of the case. Therefore, the view expressed by the learned Single Judge in the earlier petition is required to be accepted as far as the merits of the case are concerned. It is to be noted that except the contentions raised in this petition by the petitioners on delay, latches and acquiescence which are raised for the first time, the learned single Judge, on other

points on the settled principles of law allowed the said petition. With a view to maintain parity and to respect the decision rendered by my brother Judge, unless it is shown that the view expressed by him is contrary to the law, the same cannot be disturbed at the outset easily. Having carefully considered the reasonings and the conclusions reached by the learned single Judge, I am of the view that the judgment delivered in the earlier petition by my learned brother (Justice D C Srivastava) is in consonance with the law laid down by this court as well as the Apex Court.

11. Even keeping aside the said judgment for the time being, after considering the law on the points involved, I am of the opinion that the case of the petitioners is duly covered by a number of decisions.

12. The Full Bench of this court in the case of M/s. Avanti Organisation v. Competent Authority (1989) 1 GLR 586, in para 16 of the judgment observed that if the acquisition process is allowed to be completed before the exemption application under section 20(1) is disposed of and if the lands in respect of which exemption is claimed stand acquired and vest in the State Government, it would cause an anomalous position if the State Government ultimately decides to grant exemption in respect of the said lands. To avoid such situation to happen, it was observed that it would be in the fitness of things that the proceedings should in no case be allowed

to proceed beyond the section 10(2) stage if the exemption application has not been disposed of by then.

12.1. The Division Bench, in the case of Savitaben Ramanbhai Patel v. State of Gujarat (1999 (1) GLH 100) held that the State is bound to follow the decision of this court. Under the circumstances, the proceedings initiated in the present two cases in respect of the lands upto the stage of section 10(2) of the Act are for the present left untouched. The prosecution of further processes under the Act after the stage of section 10(2) of the Act will depend upon the decision on the applications under sections 20 and/or 21 of the Act.

12.2. In the case of Samrathben M Chokshi v. State of Gujarat 1994 (1) GLR 203 again the Division Bench of this court also reiterated that the State is under a duty to stay proceedings beyond the stage of section 10(2) of the Act both if an exemption application under sections 20 or 21 is preferred. The Division Bench overruled the decision rendered by the learned Single Judge.

12.3. In the case of Nirmalaben Manilal Doshi v. State of Gujarat (1984) 1 GLR 322, it is true that the Bench in that case was concerned with the case where an application under section 20 of the Act for exemption was taken and pending at the time when the further process under the act were prosecuted. But the court found that there is no

warrant to make a distinction between a case where an application under section 20 is pending and a case where an application under section 21 is pending. Section 20 deals with the general power to exempt. Section 21 deals with the power to treat and declare as not excess land even though the person holds the land in excess of the Ceiling limit, in contingencies set forth therein.

12.4. The Apex Court has, however, gone a little further in the case of Smt.Darothi Clare Parreira v. State of Maharashtra (supra) (AIR 1996 SC 2253. It was held in this case that, "having regard to the scheme of the Act, it cannot be said that until the application under section 21 or sec. 20 is considered and disposed of, the competent authority has no power to have the notification under section 10(3) vesting the excess land in the Government published. The very language of Sections 20 and 21 and the exercise of the power thereunder would arise only when the land stands vested in the Government. The power of examination and exemption would arise only when the Government becomes the owner and the erstwhile owner seeks to obviate the hardships under section 20 or to subserve the housing scheme for weaker sections under section 21 as envisaged thereunder. Thereat the Government is required to consider whether the proposal made by the erstwhile owner for undertaking the schemes as envisaged under section 21 or hardships as envisaged under

section 20 for exemption would merit consideration." Thus, from this verdict of the Apex Court, it is clear that the authorities, even during pendency of scheme/application under section 20 or section 21 of the Act, could have gone upto the stage of section 10(3) of the Act and not beyond that.

13. The above observations of the Apex Court would clearly go to suggest that the Government can go upto the stage of section 10(3) of the Act. In other words, it is within the right of the petitioners to file scheme application even after issuance of notification under section 10(3) of the Act. The Division Bench consisting of myself and Justice M.S. Shah in LPA No.5 of 2002 vide order dated 25.6.2003 has observed that

> "the application filed by the original petitioner under section 21 of the Act has remained pending and the authorities could not decide the same even though they were directed to do so by this court vide order dated 4.10.1991. Learned AGP, Mr Dave submitted that after rejecting the scheme on 11.2.1987, the authorities have taken possession of the land by resorting to section 10 of the Act. In our opinion, the authorities are n not competent to initiate proceedings beyond the stage of section 10(2) and prepare statement under sections 10(3) and 10(5) of the Act, in view of the fact that the

appeal against rejection of the order passed by the competent authority dated 11.2.1987 was allowed on 15.1.1991 whereby the competent authority was directed to decide the application under section 21 of the Act in accordance with law (which is not decided subsequently) all proceedings initiated by the competent of taking possession beyond section 19(2) of the Act are illegal and bad in law."

Against the said order, review application being Misc.Civil Application No.2228 of 2004 was filed and to condone the delay in filing the said application, Civil Application No.524 of 2005 was filed before us. We, by order dated 18.2.2005, considered both the applications simultaneously and observed that application under section 21 of the Act was very much pending on 30.3.1999, it was not possible to interfere with the view taken by the learned single Judge that the proceedings pending on 30.3.1999 had abated. It was also observed therein that if the competent authority did not take any decision on the application for exemption under section 21 of the Act between 15.1.1991 and 30.3.1999, the competent authority must thank itself for the consequences of its inaction and the consequential abatement of the proceedings. It was further observed that it would not be possible now to set the clock back and to direct the competent authority to decide the petitioner's application under section 21 of the Act of 1976

when the Act itself has been repealed by virtue of the provisions of the Urban Land (Ceiling & Regulation) Repeal Act, 1999. In view of the above, the court opined that no useful purpose would be served by condoning the delay of eight months when the applicants have not shown a good case for review of the order dated 25.6.2005.

14. In view of the settled law on the point that the respondents are not justified in taking possession of the land in question when the application under section 21 of the petitioners was pending, let us consider the case. Admittedly, the petitioners filed application under section 21 on 22.8.1985 within the period prescribed under Rule 11 (b) of the Rules. On 25.7.1985, notification under section 10(3) of the Act was issued vesting of lands with the Government. On 20.3.1986, the respondents took possession of the land under panchnama. The appeal preferred against the order dated 15.12.1986, rejected by the tribunal on 28.11.1995 on the ground that notification under section 10(3) was issued and the notice under section 10(5) for taking possession was already issued and notice under section 11(4) a determining compensation was also issued. Thus, admittedly, the proceedings for taking possession under section 10(5) and determining the amount of compensation under section 11 initiated when the application under section 21 was already pending. In view of the decisions referred to above, the respondents could not have proceeded beyond section 10(3) of

the Act. The review application preferred on 29.4.1998 was allowed on 19.9.1998 whereby the order dated 28.11.1995 was set aside on the ground that all the proceedings after section 10(3) were taken in great haste and especially when the application under section 21 was pending. It was observed that if the said application was granted, housing accommodation could have been provided to the poor persons which is the object of the Act. Even though the tribunal remanded the case for fresh decision, the competent authority did not initiate any proceedings nor any appeal is preferred by the respondent challenging the order passed in the review application by the tribunal. Therefore, the order passed in the review application has become final as far as the respondents are concerned and the petitioner, on the contrary, filed first petition challenging the order of the competent authority declaring excess vacant land and to give back possession which was illegally taken in the year 1985. In view of this factual position, I am clearly of the opinion that on the decision in the review application, proceedings under section 21 of the Act became alive and, therefore, it is within the right of the petitioners to challenge the action of the respondents of taking possession from them which was illegal on the face of it. I am in entire agreement with the views expressed by my learned brother Justice D C Srivastava in holding that the action of taking possession whether actual, symbolic or on paper, on 20.3.1986 is

illegal. I also agree with the observations made by the learned single Judge that if an application under section 20 or 21 of the Act was pending, proceedings upto section 10(2) of the Act only could be maintained and further proceedings after section 10(2) would not survive. Further proceedings after section 10(2) of the Act will depend upon the decision of the application under sections 20 or 21 of the Act. In the case before me this situation does not arise because of Repeal Act, the remand order of the tribunal, for all purpose, has become infructuous and the competent authority, after the Repeal Act cannot take up scheme application under section 21 of the Act for fresh consideration but in any case, since the scheme under section 21, the petitioners' application was pending, the competent authority could not have travelled beyond section 10(2) or at the most 10(3) of the Act in view of *Smt. Darothi Clare's case* (supra).

15. The next question that arises for consideration is whether the possession of the lands in question is taken legally and in conformity with the provisions of law. It is the case of the petitioners that the possession was taken only on paper and the physical possession of the excess l and is still with the petitioners and, therefore, the paper possession is not in compliance of the proviso to section 4 of the Repeal Act. It is averred in the petition in para 3.3 that the respondents came to have taken possession of lands mentioned in the panchnama dated 20.3.1986

(Annexure 'D') in presence of panchas Udesinh Govindbhai and Motibhai Somabhai after giving notice dated 23.1.1986 to Ambalal Purshottamdas, Bhikhabhai Maganbhai, Natwarbhai Bhailalbhai, Jayantibhai Natwarbhai. In fact, Ambalal Purshottamdas had expired on 30.12.1985 and notice issued by the respondent was returned unserved to the competent authority. The said notice could not be served upon Ambalal Purshottamdas since he expired and in fact no not served upon Bikhabhai Maganbhai, Natwarbhai Bhailalbhai or Jayantbhai Natwarbhai. Actual possession mentioned in the panchnama was not taken by the respondents from any land holder/s and the panchnama appears to be a paper panchnama made in the office of the competent authority without any site visit.

16. Affidavit-in-reply filed on behalf of respondent no.2 in para 4, it is stated as under:

> "So far as para 2 (7) to 2 (12), 3(1) and 3(3) of memo of petition is concerned I say and submit that the submissions made by the petitioner are denied, because the possession of additional excess land has already been taken over on 30.3.1986 by the Government in the presence of panchas."

17. Respondent no.2-competent authority and Additional Collector has also filed affidavit-in-reply in para 5.10 wherein it is stated that after the

notification was issued notices dated 17.12.1985 were issued under section 10 (2) of the Act and the same were duly served upon Ambalal Purshottamdas Patel, Jayantibhai Baburbhai Patel and Natwarbhai Bhailalbhai Patel. Copies of the acknowledgement receipts are annexed and marked as annexure R 9 collectively. In para 5.11, it is stated that in spite of the aforesaid notice under section 10(5) of the Act since the land holders did not hand over the possession of the lands in question has been fixed on 1.2.1986 at 11.00 hours and that they should remain present on the spot and hand over the possession of the said lands. The said notice insofar as Ambalal is concerned, was returned back with an endorsement that the owner has expired. However, the said notices were duly served upon Natwarbhai Bhailalbhai Maganbhai. Copies of the acknowledgement receipts are annexed hereto and marked as Annexure – R10. In para 12, it is stated that since the landholders did not hand over possession in pursuance of the aforesaid notices, the possession of the lands in question was taken over by the Competent Authority on 20.3.1996 in the presence of panchas and a panchnama was drawn accordingly. Copy of the aforesaid panchnama dated 20.3.1986 is annexed and marked as Annexure R-11.

18. From the aforesaid to affidavits of the respondents, it is clear that out of 19 petitioners who are holding the lands in question, admittedly,

under section 10(5) notices dated 17.12.1985 were served to only 4 persons including Ambalal. Ambalal thereafter expired as can be seen from the averments made in para 5.11 of the affidavit of second respondent. Admittedly, notice dated 22.1.1986 informing landlords asking them to remain present on the spot for the purpose of handing over the possession was only served to Natvarbhai, Jayantibhai and Bhikhabhai Maganbhai. Even though the authorities were in know of the fact that Ambalal Purshottamdas has expired, before 22.1.1986, no attempt was made to issue notice to the heirs of Ambalal . In any case out of 19 persons, possession of the lands in question as per the case of the respondents, was taken by issuing notice to only three persons. It is the case of the petitioner that on 20.3.1986 illegal, symbolic possession of the excess land was taken by the respondent and no actual possession was taken. According to the petitioners, they are still in possession of the land in question. The petitioners have, therefore, prayed that the action of the respondents of taking possession of the so - called excess land on 20.3.1986 is illegal and the State is in unlawful possession of the scheme land from 20.3.1986 to 30.3.1999 and therefore, the prayer is made by directing the respondents to hand over possession of the land which was taken as paper possession of the land in question. My learned brother Justice D C Srivastava, while deciding Special Civil Application No.8420/99 after

considering the effect of the repeal Act, has observed as under:

> "It is, thus, clear from section 4 of the Repeal Act that, pending proceedings relating to any order made or purported to be made under the principal Act shall abate, but such proceedings will not abate in relation to sections 11,12,13 and 14 of the principal Act, where possession of the land has been taken over by the State Government or by any person duly authorized by the State Government or by the competent authority."

In para 10 of the judgement the learned single Judge observed as under:

> "Thus, under section 3, vesting of vacant land will not be affected in cases where possession of the land has been taken over by the State Government or by a person duly authorized by the State Government or by the competent authority."

Before my learned brother, a question was raised is whether in view of the disputed question of Government's taking over possession of excess land can be decided in a petition in exercise of jurisdiction under Article 226 of the Constitution of India to which he has observed as under:

> "Normally, disputed questions of fact, which require taking evidence, are not to be decided in exercise of writ jurisdiction by the High Court under Article 226 of the Constitution of India. However, if it is prima facie shown by the Government, namely, the

respondent no.1 that possession was taken in accordance with the requirement of the Repeal Act section 4, then it cannot be adjudicated, whether it was paper possession or symbolic possession or illegal possession. If, however, it is found that possession was not taken, as contemplated by the Repeal Act, then, certainly it can be said that possession was not taken in accordance with law and such finding can be recorded in exercise of writ jurisdiction under Article 226 of the Constitution of India because, such finding will not require any evidence. On the other hand, it has to be seen whether the so-called possession was taken over as provided under the Repeal Act."

The court in that case observed that the decision relied upon the decision in the case of M/s.Larsen & Tubro Ltd. v. State of Gujarat by the learned Advocate for the petitioner was not a case under the ULC Act or under the Repeal Act. That it was a case under Land Acquisition Act and it was a distinguishable case on facts. It was held that the allegation in the present case was that the possession of acquired l and was taken by the State Government in presence of Panchas and Panchnama was also prepared and entries were also made in panchnama and also in Revenue Record showing taking of possession. Even affidavits were filed by the panchas alleging and deposing that their signatures were obtained on blank papers

that they had not gone to the site. In this connection, the court observed upholding the view taken by the Apex Court on such affidavits that it would be meaningless and cannot be relied upon to hold that the possession was not taken. The court distinguished the two cases and observed that in the present case, the possession was taken in normal course in presence of witnesses and their signatures were obtained on panchnama and entries were also made in Revenue Records showing taking of possession. There was, thus, prima facie material to indicate that possession was taken in accordance with law and subsequent affidavit of some of the panchas denying their signatures on the panchnamas was found to be meaningless. The court has further observed as under:

> "In the case before me, the facts are otherwise. In the counter affidavit of competent authority, Shri SA Patel, all that is mentioned is that, notification under sec. 10(3) was issued on 31.5.1985, which was duly published on 25.7.1985 and excess land vested in the Government and no right, title remained in the hands of the petitioner. It is further deposed that thereafter notices under section 10(5) had been issued on 17.12.1985 and 23.1.1986 which were duly served upon the petitioner by Regd.Post. Thereafter, possession of the land in question was taken over on 20.3.1986 in presence of panchas. It is not indicated in this affidavit that any

panchnama was executed or signatures of panchas were obtained. It is also not indicated who were the Panchas. Likewise, it is not indicated in what manner possession was taken namely, whether any boundary pillar was erected over the excess land or someone on behalf of the Government was deputed there to demarcate the land and keep watch over the same. It is also not indicated that any fencing was erected around the excess land. Such vague affidavit cannot be relied upto, especially when there is affidavit of the petitioner that he is still in possession and the so-called delivery of possession is paper transaction. The requirement of law, under sections 3 and 4 for taking possession is like this. The possession of excess land is to be taken over firstly by the State Government, secondly, by any person duly authorised by the State Government and thirdly, by the competent authority. The petitioner has filed a short affidavit which cannot be considered to be a material for holding that recovery of possession was in accordance with legal mandate of the Legislature reflected under sections 3 and 4 of the Repeal Act. As such, even if actual or symbolic possession was taken or paper possession was taken, it cannot be said to be taking over possession in accordance with the Repeal Act, and such taking over possession is certainly contrary to law."

19. Having gone through the reasonings of my learned brother based on the materials on record and the affidavit-in-reply filed by respondents no.1 and 2 in the present case, I am in total agreement with the findings recorded by my learned brother Justice D C Srivastava namely; the alleged possession of the lands in question taken over by the respondent was not legal. Even if actual symbolic or paper possession was taken, it cannot be said to be taking over possession in accordance with the Repeal Act and such taking over of possession is contrary to law.

20. In view of the above discussion, I am of the opinion that the action of the authorities in taking illegal possession on paper is nothing but symbolic possession which was taken during the pendency of the scheme under section 21 of the Act. The said scheme to erect dwelling units for the weaker sections of the society under section 21 which was taken during the pendency of the scheme application under section 21 of the Act. The said scheme to erect dwelling units for the weaker section was submitted on 22.8.1985, though rejected on 15.12.1986 will be deemed to be pending in view of the remand order of the Urban Land Tribunal dated 19.9.1998. Even otherwise, on 20.3.1986, the petitioners' scheme under section 21 was pending and it was rejected by the authorities at the first instance on 15.12.1986. On all these facts, there is no hesitation to hold that the action of taking possession, whether actual, symbolic or on paper

on 20.3.1986, is illegal in view of the decisions cited above.

21. Referring back to the submissions of the learned Advocate General which have been narrated above, it appears that the contentions which are technical in nature namely; the prayers are for possession and permanent injunction and it being a civil action and remedy is available, this court may not entertain this petition under Articles 226 and 227 of the Constitution of India, as there are disputed questions of fact about the possession which can only be decided by the Civil Court. As observed earlier, normally, disputed questions of fact, which require taking evidence are not to be decided in exercise of writ jurisdiction by the High Court under Article 226 of the Constitution of India. Even if it is prima facie shown by the Government that the authorities have taken possession in accordance with the requirement of the Repeal Act under section 4 of the At, in that case also, the dispute raised in the petition cannot be adjudicated. Then the question is whether the possession in the instant case was taken as contemplated by the Repeal Act. If the finding is against the respondent, the petitioners can certainly invoke writ jurisdiction, as no evidence is required to be led to decide the said question. As observed by me earlier, the possession was not taken in accordance with law and, therefore, the petitioners are certainly entitled to invoke writ jurisdiction under Article 226 of the Constitution of India.

From the affidavits of the respondents in the earlier proceedings as well as in the present proceedings, it is clear that except 3 persons, other persons have not been served with notice under section 10(5) of the Act. I therefore, see no merits in the said submission.

22. On the contentions namely; the reliefs claimed are barred by delay, latches and acquiescence, it was submitted by the learned A.G that as the petitioners have never challenged the order declaring surplus land dated 1.2.1985 and the action of the respondents of taking possession dated 20.3.1986 for a period of 15 years when the present petition was instituted on 27.12.2001, there is gross delay of 15 years, it was submitted that even the suit for recovery of possession would be barred as the limitation period being 12 years. It was, therefore, submitted that while exercising jurisdiction under Article 226 of the Constitution, normally the court would not interfere with the possession which is already barred under the limitation Act. It was further submitted that any proceedings taken out subsequently also there has been no challenge even at the stage of application under section 21. The petitioners, therefore, have acquiesced in the proceedings and are seeking to take benefits of repeal of the ULC Act.

23. It is to be noted that till the application under section 21 filed by the petitioners is decided, there is no question of challenging the order

under section 8(4) dated 1.2.1985. It is further to be noted that the respondents have never challenged the order dated 19.9.1998 passed in the review application at any point of time till the repeal of the Act i.e. 30.3.1999 or till the date. In view of the fact that section 21 of the Act starts with non-obtante clause and therefore, sections 1 to 20 would not apply and therefore, unless and until the application under section 21 is decided before the Act was repealed, there was no occasion to challenge the order dated 1.2.1985 under section 8 (4) of the Act. As already held earlier, the possession taken on 20.3.1986 cannot be said to be a legal one and, therefore, a declaration is sought in the petition to declare the action of taking possession is illegal and contrary to law. It is to be noted that the respondents have not objected in the review petition that it cannot be allowed. Not only that but in the earlier petition, the respondents could have contended that the order in review is bad and illegal. Further the Government could have challenged the order passed in the review application on 19.9.1998 by filing separate petition before this court. Having not done so, it is clear that unless the review order is not held illegal or bad, the right to hold the lands in questions will not be there at any any point of time. In this view of the matter, it is clear beyond any manner of doubt that as the petitioners have succeeded on merits, the application under section 21 being not decided till the act is repealed, if

they still hold the land legally, their possession taken during the pendency of the scheme application is absolutely illegal and dehors the law. I also see no merits in the submissions that the present petition is filed after the Act is repealed just to take advantage of the Repeal Act. In my opinion, there is no question of taking advantage of the Act if the possession is legal. At this stage, even at the cost of repetition, I may point out that the findings recorded by the learned single Judge in the earlier petition are still available to the petitioners as the LPA Bench, on technical grounds, on the petition filed by the Attorney Holder of dead person, allowed the appeal and has not touched the merits of the case. On the earlier petition, the State failed to take such a plea of delay and, therefore, the findings recorded therein, though not cited as precedent, are still available to the petitioners in law as they are not disapproved by the Bench.

24. I have gone through all the decisions on the question of delay cited by the learned Advocate General. In my opinion, they are not applicable to the facts of the present case in view of the fact that there is no delay till the scheme application under section 21 of the Act is decided either way. Unless and until it is pending, no land can be declared as excess, otherwise the legal right to hold the lands in question would be made nugatory which can never be the intention of the Legislature. In the

decisions cited for delay, the Hon'ble Courts have found that even on merits, there is no case. However, in the instant case, there is a strong case that during the pendency of scheme application, the possession of lands is taken and, therefore, that illegality is found by the tribunal while reviewing the order rejecting the scheme application and, therefore, the matter was remanded to the competent authority in the year 1998. This was not the case in any of the decisions cited by the Government and, therefore, they are not applicable in the instant case. It can never be the intention of the Government that on the one hand the right under section 21 is revised, and on the other hand, by taking illegal possession during pendency of scheme application, the said right under section 21 is made nugatory by Government itself by enforcing the decisions on delay etc. Therefore, in my opinion, all actions taken beyond section 10(3) must be held illegal as decided by this court in LPA No.5/2002 dated 25.6.2003 which has been accepted by the Government after it lost in S.L.P and thereafter in Review Application No.524/05 dated 18.2.2005. Needless to say that the facts and legal submissions of that case are almost applicable to the present petitioners.

25. On the submissions advanced that the void orders are also required to be set aside and the decisions cited to substantiate the same, there cannot be any dispute to the said proposition. However, the order dated

1.2.1985 under section 8 (4) becomes void only after the Act is repealed on 30.3.1999 as till the said date, there was no necessity for the petitioners to challenge that order dated 1.2.1985. I agree with the submissions advanced by the learned counsel for the petitioners that had their application under section 21 been decided before the Act was repealed on 30.3.1999, the petitioners would have to challenge the order dated 1.2.1985 as illegal and void but the petitioners' right to review the case under section 21 is required to be declared as having bad under section 4 of the Repeal Act 15/99 and, therefore, the only course open to them is to challenge the 1985 order only in 1999 and therefore, Special Civil Application No.8402/99 was filed and was allowed. Likewise, it may be stated that there is no dispute about taking possession and by making panchnama but what is disputed by the petitioners is its legality. Till their scheme application is decided, even if the possession is taken, it is illegal in view of the law laid down by this court. Further, before the application under section 21 is rejected i.e on 15.12.1986 and the possession was taken on 20.3.1986 which is absolutely illegal and, therefore, the review authority has observed in his order that the Government has made undue haste in proceeding further beyond section 10(2) and (3) of the Repeal Act, 1976. This was never the case in the authorities cited by the respondents and, therefore, in my opinion, none of

the authorities are applicable to the facts of the present case. I, therefore, see no merits even in this submission of the learned A.G.

25.1. Finally, the submission of the learned A.G is that even the decisions reported in Darothi Clare Parreira (supra) reported in AIR 1996 SC 2552 and in the case of Special Officer & Competent Authority ULC & P S Rao, reported in AIR 2000 SC 843 nor Full Bench Judgment lay down that if the possession has been validly taken after the appeal has been dismissed and the compensation determined will not be of any assistance to the respondents. He further submitted that sub-section 2 of section 3 cannot operate in favour of the petitioners because proceedings under section 10(3), 10(5) and 11 are concluded. I see no substance even in this submission. The logic beyond law of section 21 is that as soon as it is granted there is no excess land and, therefore, there is substance in saying that the possession taken during the pendency of the application is illegal and unauthorised also. Once the tribunal allowed the review application, by setting aside the order dismissing the appeal, all the actions taken by the Government after section 10(3) including the possession taken are illegal. Therefore, taking possession under section 10(5) and the proceedings under section 11 are invalid in law.

26. I also see no merits in the submission that as petitioners no.15 to 19 only claimed the relief for review and no other person interested has

filed a review petition, the benefit of the review cannot be claimed by the other petitioners and the decision as regards surplus land is final because exemption application has been rejected in appeal. Frankly speaking, the said argument is nothing but an absurd argument as it is the order which is to be reviewed and not qua number of persons. The scheme application was filed by all 23 co-owners which is clear as can be seen from pages 335 and 336. Further the review petition is allowed on 19.9.1998 not in respect of 4 persons only but as the entire order was sought to be quashed and the prayer was allowed by the review authority by the said order and it has attained finality. Any assailment upon the order in review application dated 19.9.1998 by the Government, now in petitioners' petition, has no meaning in law as that review order is binding to them as having not been challenged till the date. In any case, once the respondents accept the legal benefit to be granted only to petitioners no. 15 to 18/19, the same benefit in my opinion should also be available to the rest of the petitioners as under section 21 application itself is filed by all 23 persons and order in review has not been limited to four persons only as contended by the respondents.

27. In view of the above discussions, I am of the view that it is not cogently established that the respondents had taken over the possession of excess land in accordance with the Repeal Act. Secondly, the action of

the respondents upto the stage of 10(3) has to be left untouched but beyond that, the action under 10(5) in taking over possession under section 11 to decide compensation becomes illegal, as such the petition succeeds.

28. In the result, this petition is allowed. It is declared that the panchnama dated 20.3.1986, Annexure 'D' and the purported action of the respondents to take possession constructive or actual of the lands mentioned in para 1 in the petition, is contrary to law and of no legal effect. The respondents are permanently restrained from disturbing or taking possession of the petitioners' land admeasuring 12,385 sq.meters or any part thereof mentioned in panchnama dated 20.3.1986, Annexure 'D'. In view of the disputed claim of possession of the lands by the parties, it is directed that possession of the area of 12,385 sq.meters on final plots no.115, 116, 108, 287 and 280 of Manjalpur district Vadodara is ordered to be restored by the respondents to the petitioners, if taken, within a period of two weeks from today. Rule is made absolute accordingly with no order as to costs.

[Kshitij R Vyas, J.]

FURTHER ORDER

At this stage, Mr K L Pandya, learned AGP requests for stay of operation and implementation of this order for a period of 15 days. Considering the fact that this court has already ordered the parties to

maintain status quo which is in operation till the date, the parties shall maintain status quo with respect to the lands in question for a period of two weeks from today.

[Kshitij R Vyas, J.]

msp